Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	
	)	

Reply Comments on behalf of the following cities in Washington State: Bellevue, Bothell, Burien, Ellensburg, Gig Harbor, Kirkland, Mountlake Terrace, Mukilteo, Normandy Park, Puyallup, Redmond and Walla Walla.

Ogden Murphy Wallace, P.L.L.C.
W. Scott Snyder
Elana R. Zana
901 Fifth Avenue, Suite 3500
Seattle, WA 98164
Telephone: (206) 447-7000
Facsimile: (206) 447-0215
ssnyder@omwlaw.com
ezana@omwlaw.com

April 7, 2017

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	WT Docket No. 16-421
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

TABLE OF CONTENTS

These reply comments are submitted on behalf of the following cities in Washington State: Bellevue, Bothell, Burien, Ellensburg, Gig Harbor, Kirkland, Mountlake Terrace, Mukilteo, Normandy Park, Puyallup, Redmond and Walla Walla.

I. INTRODUCTION

The Washington cities submitting this reply stand together, eager and ready for the explosion of connectivity promised by the wireless industry. Washington State is a hot bed for technological growth. The I-5 corridor is in the midst of a population boom as our technology sector—led by Amazon, Microsoft, Boeing, Expedia and satellite offices of Google, Apple, and Facebook—grows. The cities in this consortium banded together to respond collectively to Mobilitie's requests for cell towers in the rights-of-way, and to create template applications, code revisions and franchise agreements in anticipation of small cell deployment. The City of Kirkland adopted a small cell ordinance in advance of *any* applications for small cell deployment. However, small cell facilities are still not deployed. Other than in the City of Bellevue, none of the cities that are members of this consortium received small cell applications from the wireless industry until the end of 2016.[1]

However, the wireless industry wants the Commission to believe that cities stand in the way of wireless deployment. That city staff and city councils, obligated to protect the health and safety of its citizens, have created unreasonable barriers to entry. That cities are living in the dark ages and are siting small cell facilities using macro facility standards. These gross exaggerations obscure cities' significant role in the stewardship of the public right-of-way

The wireless industry has poisoned its own well. The introduction of small cell deployment to many cities in Washington came from Mobilitie, asserting a *right* to place new poles in the rights-of-way, some at 120 feet. Mobilitie used multiple names and had a revolving door of "contract specialists" contacting our cities' staff. Cities were left quite bewildered as to the difference between a small cell and macro-facility following Mobilitie's introduction which presented a new, and unique approach in the industry. At the end of September 2016, at our invitation the wireless industry (Mobilitie, Sprint, T-Mobile, Verizon, and AT&T) presented their respective approaches to small cell deployments to approximately 30 cities in Washington. This was the first introduction for most of these city planners and public works departments to the upcoming small cell deployments. The presentations were well prepared and informative, and our involvement of the wireless industry was greatly appreciated by all participants.

However, just as the cities began to understand the differences between small cells and macro facilities, and the necessary infrastructure (power and backhaul) needed for small cells, the wireless industry began a series of end runs around the local process. Mobilitie filed its Commission petition and the wireless industry in general submitted draft legislation to the

[1] This excludes Mobilitie, who made blanket inquiries across Washington State for its deployment of its large macro-towers in the rights-of-way as well as its small cell facilities on new poles in the rights-of-way. Several cities in the consortium rejected as incomplete initial applications sent by Mobilitie in the summer of 2016, and though we are in active discussions with Mobilitie, we have not received revised applications. However, we appreciate that Mobilitie is working cooperatively with the consortium.

Washington State Legislature.[2] Rather than continuing the dialogue with the cities about small cells and its benefits to the community, the wireless industry sought to preempt local authority. Now, city staff are forced to educate their planning commissions and councils on potential state and federal preemption, rather than continuing and completing the process they had begun to adopt related to small cell siting criteria, code revisions, streamlining the permitting process and expediting the process to bring the benefits of small cell technology to our citizens.

The issue here is one of messaging, approach and education. The wireless industry representatives that meet with the city planners are respectful, prepared, and understand local constraints and concerns. They discuss how batching can be beneficial, what a small cell site would look like on existing utility poles, and how to modify or build new light standards to match with the city's aesthetics and neighborhoods. This messaging of cooperation and collaboration stands in contrast to the national wireless industry. For example, comments such as those made by Mr. Jabara, CEO of Mobilitie, only discourage cities from obliging the wireless industry:

> It comes down to how savvy, how selfish or how stupid the elected officials -- the mayor and the city councilors -- are. There are many stupid cities around the country -- really dumb. They're greedy. They have their hands out. They don't give a s*** about their constituents. They don't care.…[3]

This type of message coming from the CEO of a company that has pending applications in over 300 cities is unhelpful and does not encourage cooperation from the cities. This is not how the wireless industry as a whole can successfully conduct business with its customers, partners, or the municipalities to whom it is applying to open up their rights-of-way.

The wireless industry complains that cities are unreasonable and slow to allow deployment of small cell facilities. It flexes its muscles both on the federal and state level, maligning cities as barriers to technological improvements. The wireless industry is asking that the cities abdicate their responsibilities to their citizens to effectively manage the rights-of-way. It further asks that the cities do so within an artificially speedy (not a reasonable) period of time and not based on the complexity of a particular application. The industry asks that wireless infrastructure requests be placed ahead of other telecommunications requests. Ignoring the burden that their applications place on limited staffing, the industry requests that city staff be barred from hiring consultants to assist in such processes. Ignoring the fair market value of the public asset, the industry asks that only nominal fees be charged for the use of city-owned infrastructure and the usage of the rights-of-way.

Just as cities begin to understand the deployment strategy and work towards amicable resolutions such as small cell ordinances, design standards, and template franchise agreements, the wireless industry moves to preempt local action on both the state and federal level. The cities were not slow to react to the needs of the wireless industry, rather they are moving as fast as they can to

[2] The wireless industry did conduct some meetings with municipalities and lobbyists regarding its proposed legislation.

[3] Gary Jabara, CEO of Mobilitie, Tower & Small Cell Summit, Las Vegas, Sept. 7, 2016 AGL Magazine March 2017, pg. 38.

put out fires the industry started and focus on effective planning. We would rather continue those efforts than respond to the whining of the wireless industry.

The cities of this consortium ask that the Commission reject the wireless industry's requests and refuse to modify existing law by preempting city authority. We are not asking for a moratorium; we recognize the need to effectively plan so that small cell facilities can be deployed. However, in light of the limited amount of contact the wireless industry has made in these Washington cities, we ask that the Commission allow a reasonable period of time for the wireless industry and the cities to meet and cooperatively develop a mutually beneficial plan for deployment.[4]

II. THE COMMISSION HAS ALREADY CONSIDERED AND REJECTED THE INDUSTRY'S REQUESTS TO IMPOSE REDUCED SHOT CLOCKS

A theme among the wireless industry's comments is that small cell siting should occur faster because small cells are smaller and *sometimes* located on existing infrastructure in the public right of way. As it did in 2009 and 2014, the wireless industry is pressuring the Commission to shorten its shot clocks for collocated facilities. CTIA's comments advance the wireless industry's position that the Commission should interpret Section 332(c)(7) to include a 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna. The Commission rejected this request in 2009, and we ask that it do so again in 2017. The fact that some wireless facilities may be smaller than others is not sufficient or even relevant to determining wireless siting on structures that were not previously considered for wireless facility usage at the time of their construction.

CTIA first made this request in its petition for declaratory ruling to clarify provisions of Section 332(c)(7)(B) to ensure timely siting review. Summarized by the Commission, CTIA's petition proposed "that the Commission declare that a state or local government has failed to act if it does not render a final decision on a collocation application within 45 days or on any other application within 75 days."[5] The Commission reviewed the positions of both industry and municipal advocates and issued a declaratory ruling. The Commission held that a "reasonable period of time" is presumptively 90 days to process personal wireless service facility siting applications requesting collocations, and, also presumptively, 150 days to process all other applications.[6] The Commission directly considered the wireless industry's request and interpreted the exact language the wireless industry is seeking interpretation of now. CTIA's current request is nothing more than a second (third) bite at the apple to reduce the already established reasonable timeline by an additional one-third.

This claim is based on the false premise that attaching wireless communication facilities to existing infrastructure is a collocation. The Commission has rejected this argument twice and

[4] Since the beginning of January, Verizon has requested meetings in several cities and has commenced productive and effective meetings with planning and public works departments. We believe that Mobilitie and AT&T will have similar meetings in the near term.

[5] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify all Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd. 13994, 14003 ¶ 27 (2009) (hereinafter "2009 Report and Order").

[6] *Id*. at 14005 ¶ 32.

instead determined that a collocation occurs when a wireless facility is attached to an existing infrastructure that houses wireless communications facilities.[7] Section 332(c)(7) requires a local government to act on any request within a reasonable amount of time.[8] The Commission has clarified that a "reasonable amount of time" means 90 days for collocations and 150 days for other siting applications.[9] Therefore siting new wireless facilities on structures other than towers (i.e., an apartment building) falls within the 150-day shot clock and is not a collocation.

The wireless industry draws upon Section 6409(a) to support its position that there could be a collocation on a structure that does not already have any approved antenna and such collocation should be governed by the 90-day shot clock. In 2014, the wireless industry raised the argument that the initial installation of equipment on a structure should be considered a "collocation" for the purposes of Section 6409(a). The 2014 Infrastructure Order carefully evaluated the definition of "collocation" and made it clear that "Section 6409(a) will apply only where a *state or local government has approved* the construction of a structure with the sole or primary purpose of supporting covered transmission equipment (i.e., a wireless tower) or, with regard to other support structures, where the s*tate or local government has previously approved* the siting of transmission equipment that is part of a base station on that structure."[10] Therefore, under Section 6409(a) a collocation may apply to a structure or base station that a state or local government has approved for wireless siting but does not apply to sites that have not been reviewed. "In both cases, the state or local government must decide that the site is suitable for wireless facility deployment before Section 6409(a) will apply."[11]

Prior to that, in its 2009 Report and Order, the Commission favorably referenced a Florida statute pertaining to collocations giving further support to this conclusion.[12] The Florida statute defined collocations as "the situation when a second or subsequent wireless provider uses an existing structure to locate a second or subsequent antennae…."[13] In other words, there needs to be existing approved wireless facilities on a structure in order to receive the benefit of collocation. Cities should have an adequate opportunity to assess whether a facility built for a purpose other than hosting wireless facilities is appropriate for such infrastructure.

The wireless industry is effectively seeking to have both the collocation definition and a reduced shot clock apply to sites that have never been approved by the local government as suitable for wireless facility deployment. This is contrary to the Commission's prior rulings and would strip local government of the ability to conduct meaningful siting review of any existing structures that a carrier might seek to convert to a wireless facility. This would include not only poles in the rights-of-way but apartment buildings and potentially bridges and overpasses.

---

[7] *Id*. at 14010-11 ¶¶ 42, 44; *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 128650, 12883 ¶ 38 (2014) (hereinafter "2014 Infrastructure Order").
[8] 47 U.S.C. Section 332(c)(7)(B)(ii).
[9] *See* 2009 Report and Order, 24 FCC Rcd. at 14030.
[10] 2014 Infrastructure Order, 29 FCC Rcd. at 12939 ¶ 179 (emphasis added).
[11] *Id*.
[12] 2009 Report and Order, 24 FCC Rcd. at 14012 ¶ 46 n. 145.
[13] Fla. Stat. Ann. §365.172(3)(g), defining the term "collocation." The 2009 Report and Order cited to Fla. Stat. Ann. §365.172(12)(a)(1)(a) which uses the term "collocation."

III. THE COMMISSION LACKS STATUTORY AUTHORITY TO APPLY THE "DEEMED GRANTED" REMEDY TO SECTION 332(c)(7)

The wireless industry next argues that the Commission should revise the Section 332(c)(7) approval standards to adopt a "deemed granted" remedy for those applications not covered by Section 6409(a). The Commission should decline to add this remedy because it does not have the authority to do so.

The wireless industry seeks to analogize Section 332(c)(7) to Section 6409(a) because the Commission has already adopted the "deemed granted" remedy in that context. What the industry fails to address is that the statutory language of Section 6409(a) is different than that of Section 332(c)(7). Section 6409(a) states that "a State or local government *may not deny, and shall approve*, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[14] In its 2014 Infrastructure Order, the Commission interpreted this language to mean that at the end of the permitted review period, the application is deemed granted if the local government had not taken action on it.[15] The Fourth Circuit Court of Appeals specifically considered the constitutionality of the "deemed granted" language in the 2014 Infrastructure Order which issued rules implementing Section 6409(a).[16] The Fourth Circuit then upheld the Commission's "deemed granted" language because it matched the directive of Congress in implementing Section 6409(a).[17]

The same is not true of Section 332(c)(7). Congress did not include the same approval requirement found in Section 6409(a) in Section 332(c)(7). Section 332(c)(7) states that:

> [A] State or local government or instrumentality thereof shall *act* on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.[18]

Here, Congress only required that a local government *act* and specifically did not include any sort of *required* approval. In fact, Congress included qualifiers such as a "reasonable period of time" for review and permitted the local government to "tak[e] into account the nature and scope of such request."[19] Further, the statutory language already includes a remedy if there is no action. "Any person adversely affected by any… failure to act by a state or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."[20] The statutory language of Section 332(c)(7) does not give the Commission the authority to include the stricter "deemed granted" language.

---

[14] 47 U.S.C. 1455 §6409(a)(1) (emphasis added).
[15] *See* 2014 Infrastructure Order, 29 FCC Rcd. at 12957 ¶ 216.
[16] *See Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121, 128-129 (4th Cir. 2015).
[17] *Id.*
[18] 47 U.S.C. §332(c)(7)(B)(ii) (emphasis added).
[19] *Id.*
[20] 47 U.S.C. §332(c)(7)(B)(v).

It should be noted that Section 332(c)(7) was drafted well in advance of 6409(a) and, despite having it available, Congress intentionally crafted a different standard in 6409(a) to achieve different goals. If Congress intended to have similar regulations, it would have drafted similar statutes. The Commission should not now unilaterally attempt to bring harmony to two facially distinct statutory frameworks.

Importantly, Section 6409(a) has very different authorizing language than Section 332(c)(7). The Commission should not use the logic of Section 6409(a) related rulings to support a similar conclusion with Section 332(c)(7). Congress stated in Section 6409(a) that a local government may not deny and shall approve an application that qualifies under Section 6409(a); it is this language that provides the foundation for the Commission to interpret and craft the "deemed granted" requirement. This mandatory approval language is not present in Section 332(c)(7). Without that language, or any similar language, the Commission is cherry-picking from Section 6409(a) in order to fabricate a rule in Section 332(c)(7).[21]

Further, the shift to a "deemed granted" framework ends up improperly shifting the burden of a challenge to the local government without any legislative authority. Currently under Section 332(c)(7), if the local government fails to act within a reasonable amount of time, clarified by the Commission to be 90 or 150 days, the applicant may bring suit for a "failure to act" under Section 332(c)(7)(B)(v). The remedy for a failure to act under Section 332(c)(7) is embedded in the statute, unlike in Section 6409(a), where the requirement is to approve an eligible facilities request. Under Section 332(c)(7), a jurisdiction may attempt to rebut the presumption that the established timeframes are reasonable.[22] By interpreting Section 332(c)(7) to mirror Section 6409(a)'s "deemed granted" structure, the burden of appeal to the courts is shifted to the local government entity.[23] This burden is contrary to the exact wording of the statute, which requires that "any person adversely affected by the final action or failure to act by a state or local government…commences an action in any court of competent jurisdiction."[24] The statutory burden is clearly on the wireless industry to appeal the action or inaction of a municipality, not on a municipality to appeal the siting of a wireless facility under a "deemed granted" scenario. Accordingly the Commission lacks the legislative authority to enact a "deemed granted" remedy under Section 332(c)(7).

In the alternative, and rather than delaying a response, or requesting a tolling agreement, cities may be forced to deny applications at the 11th hour if they cannot review them within the prescribed shot clock. In that circumstance, the applicant's challenge to the denial would end up in court as envisioned in Section 332(c)(7)(B)(v). Therefore, the inclusions of an unsupported "deemed granted" clause may do nothing more than force local governments to deny applications.

[21] *See Wireless Infrastructure Notice of Proposed Rulemaking and Notice of Inquiry*, FCC-CIRC 1704-03, n.18, 12.
[22] 2009 Report and Order, 24 FCC Rcd. at 14010-11 ¶¶ 42, 44.
[23] *See* 2014 Infrastructure Order, 29 FCC Rcd. at 12957 ¶ 38.
[24] 47 U.S.C. §332(c)(7)(B)(v).

IV. THE COMMISSION SHOULD NOT REGULATE MUNICIPAL-OWNED POLES

The wireless industry has also asked the Commission to regulate municipal-owned poles. The wireless industry proffers two offending propositions: (1) that the shot clocks should apply to a municipal decision as to whether and on what terms it should lease its poles and (2) that the Commission should regulate the fees a municipality may charge for small cell facilities. Approval of either of these proposals runs contrary to the Commission's previous history and legislative and constitutional authority.

A. As It Has Previously Recognized, the Commission Lacks Authority to Impose Shot Clocks on Municipal-Owned Poles

Municipalities own and manage poles located in the rights-of-way, such as light standards and traffic signals, in a proprietary capacity. As such, the industry's position that a shot clock should apply to municipal-owned poles is incorrect. The Commission has previously endorsed the longstanding legal principle that absent a grant of power by Congress, it lacks authority to preempt municipalities acting in a proprietary, rather than regulatory, capacity when managing municipal-owned property. As the Commission previously stated in regard to Section 6409(a):

> [C]ourts have consistently recognized that in "determining whether government contracts are subject to preemption, the case law distinguishes between actions a State entity takes in a proprietary capacity—actions similar to those a private entity might take—and its attempts to regulate." As the Supreme Court has explained, "[i]n the absence of any express or implied implication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and when analogous private conduct would be permitted, this Court will not infer such a restriction." Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property, and we find no basis for applying Section 6409(a) in those circumstances. We find that this conclusion is consistent with judicial decisions holding that Section 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity. [25]

In 2014, the Commission refused to apply the eligible facilities request shot clock to municipal-owned infrastructure. Nothing has changed since that decision that would trigger a reconsideration of the Commission's past practice. The Commission continues to lack authority to apply a shot clock to a municipality's decision to site wireless facilities on its poles because

[25] *2014 Infrastructure Order*, 30 FCC Rcd. at 12964-65 ¶239 (2014) (quoting *American Airlines v. Dept. of Transp.*, 202 F.3d 788, 810 (5th Cir. 2000) and *Building & Construction Trades Council of Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island Inc.*, 507 U.S. 218, 231-32 (1993)) (internal footnotes and citations omitted).

such siting decisions are akin to a private landlord leasing its infrastructure.[26] When a municipality is a market participant, engaging in the same arms-length negotiations for use of its property that any private entity would, the Commission cannot and should not intervene. The principle remains the same whether the property in question is a light pole, park land, or city hall. Nothing in Section 253 or Section 332(c)(7) grants the Commission authority to preempt where a municipality is acting in a proprietary manner.

B. The Wireless Industry's Request to Limit Compensation to Costs for Municipal-Owned Poles Violates the Washington State Constitution

The Washington State Constitution prohibits local government from providing gifts or loans of credit to private entities.[27] In enacting this rule, the framers of the Washington Constitution "intended to prevent the harmful 'effects on the public purse of granting public subsidies to private commercial enterprises, primarily railroads.'"[28] Washington courts traditionally interpret this prohibition very strictly, holding that "[e]ven though a loan of public funds may be for public purposes, it violates article 8, section 7 if it inures to the primary benefit of private entities."[29] As a result, local governments are constitutionally prohibited from appropriating public property for private interests where the public interest is not primarily served.[30] In other words, Washington municipalities are constitutionally precluded from offering private entities discounted rates for private use of public property; charging a private entity less than the fair market value is a gift in violation of the Washington Constitution. Yet like the robber baron railroad tycoons of the nineteenth century, the wireless industry requests that the Commission require local government to subsidize their enterprise by limiting compensation to costs.

Recognizing that municipalities are legally obligated to manage their property in the public interest, Washington law allows local governments to enter site-specific charge agreements for placement of wireless facilities on municipal-owned structures located in the right-of-way.[31] The statute acknowledges that as the property owners, local governments should be allowed to determine the cost for using public property; however, to ensure that costs are reasonable, it sets up a binding arbitration process in which the arbitrator may evaluate the fee based "on comparable siting agreements involving public lands and rights-of-way."[32] The existing statutory scheme respects the role of local government as property owner while ensuring that

---

[26] Congress also recognizes this principle; for example, when Congress passed Section 224, it gave the Commission rate-setting authority over some rights-of-way, but excluded by definition those owned by a local governments or cooperatives. Section 224 authorizes the Commission to regulate rates, terms, and conditions for pole attachments owned or controlled by a utility. Congress then narrowly defined "utility" as not including "any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State," and defines state to include municipalities. 47 U.S.C. § 224(a)(1); 47 U.S.C. § 224(a)(3).

[27] Washington Const. Art. 8, § 7.

[28] *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 701, 743 P.2d 793 (1987) (quoting *Marysville v. State*, 101 Wn.2d 50, 55, 676 P.2d 989 (1984)). As one scholar notes, "It is now well recognized that state constitutional prohibitions against the lending of public credit were a popular reaction to the excessive subsidies provided to railroads in the nineteenth century." Reich, *Lending of Credit Reinterpreted: New Opportunities for Public and Private Sector Cooperation*, 19 Gonz. L. Rev. 639 (1984).

[29] *U.S. v. Town of North Bonneville*, 94 Wn.2d 827 835, 621 P.2d 127 (1980).

[30] *CLEAN v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996).

[31] RCW 35.21.860(1)(e)(iii).

[32] *Id.*

costs adhere to fair market value. The wireless industry asks the Commission to disregard the constitutional obligations of Washington municipalities and eviscerate their ability to responsibly and lawfully manage the public property entrusted to them. The Commission should decline to do so.

C. The Wireless Industry's Request to Limit Compensation to Costs for Municipal-Owned Poles Violates The Just Compensation Clause of the Fifth Amendment

If the Commission follows the industry's suggestion and imposes compensation limits on municipal-owned property under Section 253(c), it risks effecting unconstitutional takings from municipalities en masse. More than a century ago, the U.S. Supreme Court recognized that the federal government may not take the property of state and local governments without paying just compensation:

> It would not be claimed, for instance, that under a franchise from congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the statehouse grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control is in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways; they are the public property of the state. [33]

A physical invasion or occupation of private, state or local government property constitutes a taking that requires just compensation, regardless of whether the invasion or occupation is authorized by statute.[34] "Just compensation" is typically measured by fair market value. [35] If the Commission follows the wireless industry's suggestions, a physical taking will occur, as the wireless providers will install physical hardware on municipal-owned poles. [36] If the Commission requires municipalities to host wireless providers' equipment on municipal-owned

[33] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 101 (1893); *see also United States v. 50 Acres*, 469 U.S. 24, 31 (1984) ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States. Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.") (footnote omitted).

[34] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 441 (1982); *Century Southwest Cable Television, Inc. v. CIIF Assoc*., 33 F.3d 1068, 1071 (9th Cir. 1994).

[35] *50 Acres*, 469 U.S. at 25 (citing *United States v. Miller*, 317 U.S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller")).

[36] This is in contrast to the situation in *Qwest Corp. v. U.S.*, where the court found no taking occurred because no physical invasion or occupation occurred. 48 Fed. Cl. 672 (2001).

property, the municipalities must receive just compensation or the Commission's actions violate the Just Compensation Clause of the Fifth Amendment.

The wireless industry asks the Commission to dictate the compensation received by the municipalities for hosting its equipment on municipal-owned property. But the question of what constitutes just compensation is not one that the Commission has authority to answer. Rather, U.S. Supreme Court precedent affirms that the authority to determine just compensation resides solely with the courts.[37] If the Commission were to follow Mobilitie's suggestions regarding Section 253(c), it would open the door to countless needless suits to adjudicate the just compensation owed in each case. As Justice Holmes aptly noted nearly a century ago, "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[38] The Commission should respect its constitutional limitations and allow municipalities to manage and control municipal-owned property in a proprietary capacity.

V. INITIAL FEES ARE NOT BARRIERS TO DEPLOYMENT AND ARE LIMITED TO COSTS BY THE WASHINGTON STATE CONSTITUTION

The wireless industry argues that the initial fees and charges imposed by cities for the application process to use the public rights-of-way create significant barriers to deployment. As explained at great length in our initial comments, in Washington these fees are both constitutionally and statutorily limited and can only recover the actual costs of review. As an example of excessive fees the WIA states that, "one city in the suburbs of Seattle requires a $5,000 fee before it will begin review of the right-of-way use agreement that it requires."[39] This is misstated. Several cities in Washington require an up-front deposit of $5,000 to cover the costs associated with actual costs incurred by cities in granting and negotiating a franchise. This fee is specifically permitted in state law; the same state law expressly prohibits the imposition of a franchise fee: "A fee may be charged to such businesses or service providers that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement pursuant to chapter 43.21C RCW."[40] A charge in excess of actual costs is not a fee but an unconstitutional tax under our state constitution.

---

[37] *Baltimore & O.R.R. v. United States*, 298 U.S. 349, 368-69 (1936) ("[W]hen [a private property owner] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it." (internal footnotes omitted)); *Seaboard Air Line Rwy v. United States*, 261 U.S. 299, 358 (1923) ("It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions."); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) ("The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.")

[38] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)

[39] Wireless Infrastructure Association at 18.

[40] RCW 35.21.860

This fee is in fact a deposit and is subject to refund to the extent that the city does not expend those funds in relation to granting a franchise. Cities, by state statute, may not recover more than their actual administrative costs. This fee is also charged on a non-discriminatory basis to wireline telecommunications providers. Further, this deposit requirement would even satisfy the wireless industry's interpretation of "fair and reasonable compensation" pursuant to Section 253(c). Requiring that the wireless industry applicants make this refundable deposit places them on an even playing field with other franchise applicants and is not excessive.

VI. THE COMMISSION SHOULD REFRAIN FROM FURTHER INTERPRETING THE APPLICATION OF SECTION 253(a) AND ALLOW THE COURTS TO RESOLVE ANY CONFLICT

The Commission asked in its Public Notice whether it should resolve the circuit split regarding the application of Section 253.[41] The wireless industry advocates for Commission intervention.[42] We request that the Commission decline this invitation.

First, the Commission appropriately interpreted Section 253(a) two decades ago, when it determined that 253(a) prohibits local practices and rules that "materially inhibit" telecommunications companies from competing in a "fair and balanced" legal framework within a locality.[43] The Commission's interpretation does not require further explication. The circuits are generally in agreement in acknowledging and adopting the Commission's interpretation.[44]

Second, to the extent that a conflict exists, the conflict largely turns on the Ninth Circuit's self-acknowledged erroneous interpretation of Section 253(a) in *City of Auburn v. Qwest Corp.*[45] Section 253(a) provides, "no state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In *Auburn*, the court inaccurately quoted Section 253(a) by stating, "Section 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also those that "may ... have the effect of prohibiting" the provision of such services.'"[46] As the Ninth Circuit later recognized, by truncating and inserting an ellipsis between "may" and "have", it changed the meaning of the statute: whereas the plain language of Section 253(a) requires a plaintiff to show an actual or effective prohibition of telecommunication services, the court's interpretation

---

[41] *Public Notice*, 31 FCC Rcd. at 13370.

[42] *See e.g.* Verizon at 11-14; Wireless Infrastructure Association at 22-40.

[43] *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (1997) (interpreting Section 253(a) as prohibiting any local legal requirement that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment").

[44] *See Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477, F.3d 528, 533 (8th Cir. 2007); *Puerto Rio Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1270-71 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1188 (11th Cir. 2001).

[45] 260 F.3d 1160 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002).

[46] *Auburn*, 260 F.3d at 1175-76 (quoting *Bell Atl. v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)).

in *Auburn* required only the mere possibility of prohibition.[47] The court's error substantially broadened the reach of Section 253(a).

The First, Second, and Tenth Circuits reached decisions that largely adopted the erroneous *Auburn* interpretation, likely because the Ninth Circuit was the original circuit court to address the issue.[48] But subsequent to those decisions, the Eighth Circuit recognized the error when it decided not to follow *Auburn*[49] and the Ninth Circuit reversed itself to correct the issue.[50] It should remain in the purview of each respective court to resolve this conflict. In the alternative, it is the role and jurisdiction of the Supreme Court to resolve the conflict between the circuits. The Commission should not usurp the role of the judiciary and attempt through regulation to resolve this issue.

Third, localities have adapted to the law as applied in their respective circuits. Any further interpretation by the Commission risks upheaval in the courts and could require drastic changes on the part of local governments, resulting in further delay and cost. A further interpretation by the Commission is unnecessary and in fact could be harmful to the objectives of the wireless industry of speedy deployment.

VII. CONCLUSION

Acting on the requests of the wireless industry is premature. The Washington cities submitting these comments have worked amicably and in cooperation with the wireless industry and we hope to continue to have thoughtful and productive meetings in the near future. Preemption by either the federal or state government will only serve to discourage cooperation with the wireless industry. The cities have an obligation to its citizens to respect the millions of dollars they have spent in undergrounding, revitalizing downtown districts, and beautifying residential neighborhoods. Cities, especially in Washington, which is a hub of technological innovation, have a mission of improving wireless access and speed to grow businesses within their communities. These objectives are not antithetical to the deployment of small cell technology. Rather development of appropriate design standards encourages a partnership between the wireless industry and the cities in which both parties can achieve their aims.

We ask that Commission follow the National Broadband Plan's recommendation to establish a joint task force tasked with crafting "guidelines for rates, terms and conditions for access to the public rights-of-way."[51] In line with the goals of this joint task force, the Commission announced a Broadband Deployment Advisory Committee ("BDAC") to develop best practices to promote wireless deployments. To date the Commission received approximately 380

[47] *Sprint Telephony PCS*, 543 F.3d at 578; *accord Level 3 Communications*, 477, F.3d at 532-33.
[48] *See Puerto Rico Tel. Co.*, 450 F.3d at 18 ("Section 253(a) preempts laws that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services.") (citation omitted); *Santa Fe*, 380 F.3d at 1270 & n.9 (applying *Auburn* standard); *TCG New York*, 305 F.3d at 76 (suggesting that a local government's reservation of the "right to prohibit" service amounts to a violation of Section 253(a))
[49] *Level 3 Communications*, 477, F.3d at 532-33.
[50] *Sprint Telephony PCS*, 543 F.3d at 576-78.
[51] *See* Joint Comments of League of Arizona Cities and Towns, League of California Cities, California State Association of Counties, New Mexico Municipal League, League of Oregon Cities and SCAN NATOA, Inc., Telecom Law Firm at 31 *citing* FCC Connecting America: The National Broadband Plan 131 (2012).

nominations. Such a high number clearly shows the national interest in coming to resolution on wireless siting practices.

The preemptive actions suggested by the wireless industry eviscerate the purposes of both a joint task force and BDAC. These working groups aspire to bring the wireless industry and municipalities together to collaborate on mechanisms for strategic deployment that will hasten the construction of small cell facilities. Unilateral Commission action signals that such cooperative meetings and input are not viewed as beneficial and that the Commission can resolve these major policy issues without first encouraging the parties to find common ground. If the Commission adopts the regulatory recommendations of the wireless industry it will undercut the very purpose of these joint committees.

Please encourage and continue to allow the cities and the wireless industry to work cooperatively with one another to achieve their mutual goals of improving wireless connectivity throughout the United States. Adopting the recommendations of the wireless industry will have the opposite effect on wireless deployment, forcing cities to comply with new rules and adopt new processes, rather than focusing on enabling the actual deployment.